

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In Re: Application of:

Date: **May 1, 2009**

Berger, Jr., Allen

Serial No. **10/822,079**

Art Unit: **3634**

Filed: **April 12, 2004**

Examiner: **Blair M. Johnson**

Attorney Docket No. **240061.4**

Title: **GARAGE DOORS REINFORCEMENT SYSTEM**

REPLY BRIEF TO EXAMINER'S ANSWER

Commissioner of Patents and Trademarks
Box **BOARD OF PATENT APPEALS**
Washington, D.C. 20231

Appellant, ALLEN BERGER, JR., through his undersigned attorney replies to the Examiner's Answer as follows:

1. The Examiner relies on connecting bars 32 to anticipate the claimed invention (claim 1 and its dependent claims) but this element is non-unitary and non-continuous in the cited reference (Leist). Bars 32, as the Examiner points out, extend slightly longer than the subpanels. Col. 3, lines 1-7. That means that adjacent panels are not connected with bars 32 but rather an 8-inch reduced portion that is inserted inside bars 32 is used to connect adjacent subpanels. This makes the structure non-unitary and interrupted which is sufficient to overcome the cited reference under Section 102. The Examiner does not give any weight to these limitations in the claims. Examiner's Answer, p. 6, lines 1-3. Thus, the present invention does not require the use of a reduced portion.

Applicant respectfully traverses the Examiner's official notice rejecting the claims based on his interpretation of what "unitary" and "uninterrupted" means. There is no

documentary evidence or any other indication of the bases for the Examiner's personal opinion. The telescopic nature of elements 32 with the required smaller reinforced portion 38 cannot be made equivalent to a "unitary" and "uninterrupted" member. This is particularly important in the specialized field of hurricane protection for closures.

We know of no case in which facts judicially noticed comprised the principal evidence upon which a rejection was based or were of such importance as to constitute a new ground of rejection when combined with the other evidence previously used. *In re Ahlert*, 57 C.C.P.A. 1023; 424 F.2d 1088; 165 U.S.P.Q. 418 (CCPA 1970). The notice of facts beyond the record which may be taken by the examiner must be "capable of such instant and unquestionable demonstration as to defy dispute". *Id.* at 1091. Also, see MPEP 2144.03. The conclusory explanation advanced by the Examiner in this case falls short of these requirements specially due to the esoteric nature of the subject matter. The scope of official notice should not be broadly interpreted. The CCPA warned that it would construe narrowly the scope of facts that may be noticed and the conclusions that may be drawn from the facts. *In re Pardo*, 684 F.2d 912, 917, 214 USPQ 673, 677 (CCPA 1982).

In re Spormann provides an example of the narrow construction the courts have extended to the judicial notice doctrine. *Spormann* concerned the patentability of claims specifying a process for producing solid alkali metal sulfites from alkali metal hydroxides or carbonates. *In re Spormann*, 363 F.2d 444, 447, 150 USPQ 449, 452 (CCPA 1966). The process involved "spraying the latter, in an aqueous solution, into a dry gas containing sulfur dioxide, the temperature and humidity of the gas being such as to immediately vaporize the water to the end that very little sulfate is produced." *Id.* at 444, 150 USPQ at 449. In affirming a rejection of the claims, the Board appeared to take notice that spray drying was an old expedient for obtaining a solute in dry form. *Id.* at 447, 150 USPQ at 452. The CCPA reversed the rejection. "While we have heard of spray drying," the court commented, "it is not a technique of which we would feel free to take judicial notice." *Id.* 150 USPQ at 452. The CCPA added "if the Patent Office wishes to rely on what 'Those familiar with spray drying would know,' it must produce some

reference showing what such knowledge consists of." *Id.*, 363 F.2d at 447, 150 USPQ at 452.

In the present case, the Examiner has taken official notice of esoteric subject matter without citing a reference to support his conclusions.

2. The location of bars 32 in Leist is outside the folded ends. There is no protection in Leist for the folded ends. This is clearly enough to overcome the rejection under Section 102.
3. The conforming characteristics included in independent claim 1 cannot exist in Leist because bars 32 are outside the end folds defining the joints. This is enough to overcome the rejection under Section 102. With respect to the Section 103 rejection, neither Leist nor Berger disclose conforming the reinforcement member to the folded edge portions of the panel. It is clear in figure 3 and on page 7 of the present application that reinforcement runner members 50 and 60 conform to the shape of groove 42. This novel and non-obvious conforming feature is simply not present in either one of the cited references. Nor is it reasonable to expect a modification that will change Berger's reinforcement member to selectively enhance the reinforcement along the vulnerable folded edges thereby increasing the weight of the structure and material used only where it is needed, namely, at the joints. In addition, even attributing the highest degree of common sense, it is unlikely that conforming reinforcements could be used in this selective manner to enhance the structural integrity of the garage door system.

For these reasons, Applicant requests an early favorable action overturning the Examiner's rejections.

Respectfully submitted,
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